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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* CHRISTOPHER A. S. GAGE, JOHN R. HIND,  
and MARCIA L. PETERS

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Appeal 2009-007525  
Application 09/557,708  
Technology Center 2400

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Before MAHSHID D. SAADAT, ROBERT E. NAPPI, and  
THOMAS S. HAHN, *Administrative Patent Judges*.

HAHN, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants invoke our review under 35 U.S.C. § 134(a) from the rejections of claims 1-27. We have jurisdiction under 35 U.S.C. § 6(b). We affirm-in-part.

## STATEMENT OF THE CASE

### *Introduction*

Appellants claim a computer apparatus and method for transferring information between a user device and one of multiple servers that are managed by a dispatch server.<sup>1</sup> Illustrative independent claim 1 reads as follows:

1. A method of establishing a persistent relationship between an end user device and a server where the server is one of a plurality of servers managed by a dispatcher and the end user device accesses the server using a uniform resource locator (URL), the method comprising the steps of:

receiving at the dispatcher, a request for information from the end user device;

determining, by the dispatcher, which of the plurality of servers to select for satisfying the request;

creating, at the selected server, a token comprising at least an identifier for the selected server, a date/time stamp, and a key, said key for accessing a server-side storage area for information regarding the persistent relationship and the end user device;

inserting the token into the URL; and,

sending, by the selected server to the client device, a response with the token inserted into the URL.

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<sup>1</sup> See generally Abstract; Spec. 10:12-25; 12:1-9; Figs. 4A, 4B.

*Rejections on Appeal*

The Examiner relies on the following prior art to show unpatentability:<sup>2</sup>

Kunzelman	US 6,041,357	Mar. 21, 2000
Masters	US 6,374,300 B2	Apr. 16, 2002
Gupta	US 6,763,468 B2	July 13, 2004
Brendel	US 6,772,333 B1	Aug. 3, 2004

The Examiner rejected claims 12-21, under 35 U.S.C. § 101, as being directed to non-statutory subject matter (Ans. 3).

The Examiner rejected claim 9, under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Appellants regard as the invention (*id.*).

The Examiner, under 35 U.S.C. § 103(a), rejected:

1. Claims 7, 8, 18, and 19 as unpatentable over Kunzelman and Masters (Ans. 4-6);
2. Claims 1-6, 9, 12-17, and 22-27 as unpatentable over Brendel and Masters (Ans. 6-9);<sup>3</sup> and

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<sup>2</sup> Effective filing dates for cited prior art precede Appellants' earliest effective filing date and are not at issue.

<sup>3</sup> Claim 17 depends from claim 12, but claim 17 was not listed or addressed by the Examiner with the rejection of claim 12 (Ans. 6-9). Instead, claim 17 is listed as differently rejected over Gupta and Masters without explanation (Ans. 9). Claim 6, which depends from claim 1, recites the same limitation as claim 17. Both base claims 1 and 12 are rejected over Brendel and Masters, and claim 6 is addressed along with claim 1 for this rejection (Ans. 8). Appellants have not separately argued either claim 6 or 17.

Accordingly, any error by the Examiner is not a contested subject for this appeal. From this record, we conclude without further attention that merely

3. Claims 10, 11, 20, and 21 as unpatentable over Gupta and Masters  
(Ans. 9-11).

*Appellants' Contentions*

Appellants contend the Examiner erred in rejecting claims 12-21 under 35 U.S.C. § 101 by solely arguing independent claim 12 (App. Br. 6-7).<sup>4</sup> We, accordingly, select claim 12 as representative for this rejection pursuant to our authority under 37 C.F.R. § 41.37 (c)(1)(vii). Specifically, Appellants contend that the recited “computer program product having computer readable code means” is a “computer readable medium” that is an article of manufacture and, thus, is statutory (App. Br. 6).

Appellants contend the Examiner erred in rejecting claim 9 under 35 U.S.C. § 112, second paragraph, as being indefinite because the recited “all filtering is performed within the dispatcher” is a “simple concept that filtering occurs and that all filtering occurs within the dispatcher” (Reply Br. 5).

Appellants contend the Examiner erred in rejecting claims 7, 8, 18, and 19 under 35 U.S.C. § 103(a) by solely arguing independent claim 7 (App. Br. 8). We, accordingly, select claim 7 as representative for this rejection pursuant to our authority under 37 C.F.R. § 41.37 (c)(1)(vii). Specifically, Appellants contend that Kunzelman and Masters, the cited obviousness references, fail to teach or suggest recited limitations (App. Br. 8-15).

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apparent oversights were made in not listing and addressing claim 17 as rejected over Brendel and Masters. The above rejection listings accordingly are corrected.

<sup>4</sup> Throughout this opinion we refer to the Appeal Brief filed May 29, 2008, the Examiner’s Answer mailed Sep. 18, 2008, and the Reply Brief filed Nov. 18, 2008.

Appellants contend the Examiner erred in rejecting claims 1-6, 9, 12-16, and 22-27 under 35 U.S.C. § 103(a) by solely arguing independent claim 1 (App. Br. 15). We, accordingly, select claim 1 as representative for this rejection pursuant to our authority under 37 C.F.R. § 41.37 (c)(1)(vii). Specifically, Appellants contend that Brendel and Masters, the cited obviousness references, fail to teach or suggest recited limitations (App. Br. 15-17), and further that an ordinarily skilled artisan “would not have been impelled to [combine the references] . . . since to do so would address an issue already addressed by . . . Brendel” (App. Br. 16).

Lastly, Appellants contend the Examiner erred in rejecting claims 10, 11, 20, and 21 under 35 U.S.C. § 103(a) (App. Br. 17). Specifically, Appellants contend, *inter alia*, that Gupta and Masters, the cited obviousness references, fail to teach or suggest that “the URL is updated to indicate the removal of the cook[ies], as claimed” (App. Br. 19).

*Issues on Appeal*

1. Did the Examiner err in rejecting representative claim 12 under 35 U.S.C. § 101 because the recited “computer program product having computer readable code means” is a statutory article of manufacture?
2. Did the Examiner err in rejecting claim 9 under 35 U.S.C. § 112, second paragraph, because the recited subject matter particularly points out and distinctly claims the subject matter which Appellants regard as the invention?
3. Did the Examiner err in rejecting representative claim 7 under 35 U.S.C. § 103(a) because Kunzelman and Masters alone or in combination fail to teach or suggest the recited limitations?

4. Did the Examiner err in rejecting representative claim 1 under 35 U.S.C. § 103(a) because Brendel and Masters alone or in combination fail to teach or suggest recited limitations, and because there is inadequate reasoning and underpinning rationale for combining Brendel and Masters?
5. Did the Examiner err in concluding under 35 U.S.C. § 103(a) that Gupta and Masters alone or in combination teach or suggest “updating said URL to indicate the removal of said cookies” as recited in independent claims 10 and 20?

## ANALYSIS

### *Rejection under 35 U.S.C. § 101*

Reviewing the record for this rejection (*see* App. Br. 6-7; Ans. 11 (Response to Argument); Reply Br. 2-3), we disagree with Appellants’ conclusions.

The Examiner disagrees (Ans. 11) with Appellants’ contention identified *supra* that the recited “computer program product having computer readable code means” is a “computer readable medium” that is a statutory article of manufacture (App. Br. 6). This dispute focuses on whether an article of manufacture is claimed, which the Examiner concludes as not being claimed (Ans. 11). Appellants respond with continued reliance on conclusory contentions and supplement with general references to issued patents as supposedly having allowed claims reciting the same disputed limitations (Reply Br. 2-3). No relevance, however, for Appellants’ conclusion of claiming statutory material is available from the references to issued patents because it is well settled that the prosecution of one patent

does not affect the prosecution of an unrelated application. *In re Wertheim*, 541 F.2d 257, 264 (CCPA 1976) (holding that “it is immaterial in ex parte prosecution whether the same or similar claims have been allowed”).

Based on reviewing the record, we agree with the Examiner’s interpretation that the recited “computer program product having computer readable code means” does not cover code stored on a storage medium, i.e., an article of manufacture. Instead, using ordinary and accustomed term meanings so as to be consistent with Appellants’ Specification, we interpret the substantively recited computer program having readable code as broadly as is reasonable to be code or software and nothing more, as does the Examiner. *In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997). We do not find evidence or rationale to support Appellants’ conclusory contention that a “computer program product having computer readable code means” is a statutory article of manufacture, i.e., a computer readable medium (App. Br. 6).

For the foregoing reasons, we sustain the rejection under 35 U.S.C. § 101 of representative claim 12 and also claims 13-21, which are not separately argued.

*Rejection under 35 U.S.C. § 112, Second Paragraph*

Reviewing the record for this rejection (*see* App. Br. 7-8; Ans. 11-12 (Response to Argument); Reply Br. 4-5), we disagree with Appellants’ conclusions.

The Examiner disagrees (Ans. 11) with Appellants’ contention identified *supra* that the claim 9 recited “all filtering is performed within the dispatcher” is a “simple concept that filtering occurs and that all filtering occurs within the dispatcher” (Reply Br. 5). The Examiner substantively



indicates that the “filtering” performed by the dispatcher is introduced as a function in claim 9 without being specified (Ans. 11). Appellants respond with arguments premised from hypothetical claims and with continued reliance on conclusory contentions that the filtering limitation recited in claim 9 is simple and is not indefinite (Reply Br. 4-5). Additionally, Appellants assert an argument premised from a limitation recited in claim 7 with the explanation that the rejected claim 9 depends from claim 7 (Reply Br. 5). Appellants, however, erred because appealed claim 9 has no dependency from claim 7.<sup>5</sup> Instead, claim 9 depends directly from claim 1, which is silent as to filtering.

We agree with the Examiner. In contradistinction to Appellants’ assertion that “claim 9 yields the simple concept that filtering occurs and that all filtering occurs within the dispatcher” (Reply Br. 5), claim 9, including incorporated limitations from the sole base dependent claim, is silent as to identifying what filtering, simple or otherwise, occurs. Accordingly, we disagree with Appellants that claim 9 is definite as to what is claimed.

For the foregoing reasons, we sustain the rejection of claim 9 under 35 U.S.C. § 112, second paragraph.

*Rejections under 35 U.S.C. § 103*

I

We reviewed the Examiner’s obviousness rejection of representative claim 7 in light of Appellants’ arguments for patentability, and we disagree

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<sup>5</sup> Originally filed claim 9 had multiple dependencies that included claim 7. The multiple dependencies were deleted by an amendment filed on June 28, 2004, and claim 9 has been solely dependent from claim 1 since that amendment was entered.

with Appellants' conclusion that the Examiner erred. Kunzelman and Masters, we conclude, teach or suggest the disputed claim 7 limitations.

We adopt as our own (1) the findings and reasons set forth by the Examiner for this rejection of claim 7 in the action mailed April 17, 2008, from which this appeal is taken (Office Action 4-5) and (2) the corresponding reasons set forth by the Examiner in the Examiner's Answer in response to Appellants' Appeal Brief (Ans. 12-13). Emphasis as to our analysis is provided below where we highlight and address specific arguments and findings regarding the obviousness rejection of representative claim 7.

Appellants recurrently contend that the Examiner failed to point out findings from the cited prior art that are relied on in concluding that claimed limitations are obvious (*see* App. Br. 8-9; Reply Br. 5-6). Appellants, for example, contend that the Examiner inconsistently indicates that Kunzelman both teaches and also fails to teach certain claim 7 limitations (App. Br. 9; Reply Br. 6). We, however, find from reviewing the Examiner's Answer that claim 7 recited method steps are consistently listed as being taught by Kunzelman (Ans. 4). Then the Examiner immediately follows by acknowledging that Kunzelman "fail[s] to explicitly teach implementation of a dispatcher [to] perform[] the steps," which are listed (Ans. 5). We conclude from this record that the Examiner did not inconsistently find that Kunzelman both teaches and also does not teach the same recited steps. The Examiner instead acknowledged that Kunzelman is deficient in teaching or suggesting implementation of a dispatcher to perform the identified steps. The Examiner indicates finding the claimed dispatcher implementation taught in Masters (Ans. 5). We, accordingly, disagree with Appellants'

conclusion that this portion of the record establishes that the Examiner erred because of inconsistency.

Appellants correctly contended that the Examiner failed to indicate finding that either Kunzelman or Masters teaches or suggests the recited “determining, at the network dispatching mechanism, if a session binding indicated by said routing token is old” (App. Br. 10-11). In the Examiner’s Answer, though, the Examiner addressed this circumstance by newly citing Masters’ disclosures that teach this limitation (Ans. 12), which Appellants acknowledged in the Reply Brief as being correct (Reply Br. 7). Then Appellants for the first time raise a new argument that the Examiner had not addressed, “the entire recited clause [which] reads ‘if said URL contains a valid routing token, further determining, at the network dispatching mechanism, if a session binding indicated by said routing token is old’ (emphasis added)” (Reply Br. 7). It is noted from the record prior to the filed Reply Brief that the Examiner did address Masters’ teaching “determining if the URL contains a valid cookie [i.e., token]” (*see* Office Action 5; Ans. 5). Further, it is noted in respect to this and other similar Appellants’ arguments that appear to be premised on attacking references for failing to disclose claimed terms that obviousness “analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).

For the foregoing reasons, we sustain the rejection under 35 U.S.C. § 103(a) of representative claim 7 and also claims 8, 18, and 19, which are not separately argued.

## II

We reviewed the Examiner's obviousness rejection of representative claim 1 in light of Appellants' arguments for patentability, and we disagree with Appellants' conclusion that the Examiner erred. Brendel and Masters, we conclude, teach or suggest the disputed claim 1 limitations, and we further conclude that the Examiner indicated adequate reasoning and underpinning rationale for combining these references.

We adopt as our own (1) the findings and reasons set forth by the Examiner for this rejection of claim 1 in the action mailed April 17, 2008, from which this appeal is taken (Office Action 6-7) and (2) the corresponding reasons set forth by the Examiner in the Examiner's Answer in response to Appellants' Appeal Brief (Ans. 13-14). Emphasis as to our analysis is provided below where we highlight and address specific arguments and findings regarding the obviousness rejection of representative claim 1.

Appellants contend the Examiner failed to identify where Masters teaches or suggests a claim 1 recited "key for accessing a server-side storage area for information regarding the persistent relationship and the end user device" (App. Br. 16). In the Examiner's Answer, the Examiner indicated that Brendel, not Masters, is found to teach the limitation, and the Examiner augments previously cited Brendel disclosures as also being relied on for finding the limitation to be taught (Ans. 14). In response, Appellants assert that "[u]pon reviewing the Abstract, Appellants are still unclear [as to] what particular teachings the Examiner is relying upon to teach the limitations at issue" (Reply Br. 11). Further, Appellants assert that the newly cited Brendel disclosures at column 4, lines 19-50, are directed to identified prior

art and do “not refer to a key to access a server-side storage area for information regarding the persistent relationship and the end user device” (*id.*). Relying on these arguments, Appellants conclude that the “newly cited passage is completely silent as to the limitations at issue” (*id.*).

We do not find relevance in Appellants’ reference to Brendel disclosing identified prior art because Appellants merely asserted this as a fact and are silent as to any relevance the fact has to their argument or why this fact might in any way render any Brendel disclosure deficient. We also disagree that the Examiner erred because Brendel does not refer to the disputed limitation. As addressed previously, precise teachings directed to specific claimed subject matter are not required. *See KSR*, 550 U.S. at 418. We agree with the Examiner because we find Brendel teaches transferring encryption keys to servers where session data is stored (Brendel, Abstract; col. 4, ll. 19-50; Fig. 5A).

Appellants also argue that the Examiner erred because the Examiner’s rationale for combining Brendel and Masters is flawed (App. Br. 16). Specifically, Appellants contend that “one having ordinary skill in the art would not have been impelled to make the Examiner’s proposed modification since to do so would address an issue already addressed by the Examiner’s primary reference of Brendel” (*id.*). Again, we disagree that the Examiner erred. The Examiner’s indicated rationale for combining Brendel and Masters is that “by inserting a cookie into a URL in order for a server to associate a client’s session with a particular URL and track/monitor the user’s activity on a particular website . . . well-known [tracking methods] in the art” (Ans. 7). We do not find this rationale premised from combining known elements with a predictable result to be mere conclusory statements,

but instead we find the Examiner has articulated reasoning with rational underpinning to support the legal conclusion of obviousness. *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006). We also are not persuaded by the argument that an ordinarily skilled artisan would or would not be “impelled” to make modifications because one reference discloses that an issue is already addressed. As the Supreme Court has stated “if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.” *KSR*, 550 U.S. at 417.

For the foregoing reasons, we sustain the rejection under 35 U.S.C. § 103(a) of representative claim 1 and also claims 2-6, 9, 12-17, and 22-27, which are not separately argued.

### III

Appellants present multiple arguments as to why the Examiner erred with the obviousness rejection of claims 10, 11, 20, and 21 (*see* App. Br. 17-19; Reply Br. 12-13). We agree with Appellants’ specifically above identified contention that the obviousness references, Gupta and Masters, fail to teach or suggest “the URL is updated to indicate the removal of the cook[ies], as claimed” (App. Br. 19).

The Examiner does not respond to Appellants’ contention premised from both of independent claims 10 and 20’s recitation for updating a URL to indicate cookie removal (*see* Ans. 14-15). The Examiner in the statement of reasons for the rejection indicates that Gupta teaches “updating cached session information and forwarding the updated session information to the server” along with other recited limitations (Ans. 9). The Examiner further

indicates that Gupta fails to explicitly teach “updating said URL to indicate the removal of said cookies” for which Masters is relied on (Ans. 9-10). However, the Examiner does not identify any specific teachings within the multiple portions cited in Masters that meet the disputed claim limitations (Ans. 10). Appellants continue in their contention and note the Examiner’s silence in addressing the limitation along with others (Reply Br. 13).

Based on the record, we conclude that the Examiner erred. In particular, for us to sustain the rejection, we would need to resort to impermissible speculation or unfounded assumptions or rationales to supply deficiencies in the factual bases for this rejection. *See In re Warner*, 379 F.2d 1011, 1017 (CCPA 1967).

For the foregoing reason, Appellants’ arguments have persuaded us of error with respect to the obviousness rejection of argued independent claim 10 and also independent claim 20. We also do not sustain the same rejection of claims 11 and 21 for similar reasons.

## CONCLUSIONS

1. This record shows that claims 1-9 and 12-27 are unpatentable.
2. This record does not show that claims 10 and 11 are unpatentable.

## ORDER

The Examiner’s decisions rejecting claims 1-9 and 12-27 are affirmed, and rejecting claims 10 and 11 is reversed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

Appeal 2009-007525  
Application 09/557,708

AFFIRMED-IN-PART

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